

NO. 21759

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT CLAYTON BUICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

FILED

MAY 1 1968

WM. B. LUCK, CLERK

OPPOSITION TO PETITION
FOR CORRECTION OF RECORD
AND
POINTS AND AUTHORITIES
IN SUPPORT THEREOF

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United States of America.

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OPPOSITION TO PETITION
FOR CORRECTION OF RECORD

COMES NOW the United States of America, respondent herein, and requests this Honorable Court to deny petitioner's motion for a review of the order of the Honorable Irving Hill, United States District Judge, denying defendant's petition for correction of record for the following reason:

The order issued by the District Court is conclusive as it relates to the attempt to correct the transcript of the trial.

In support of said opposition respondent submits this opposition, the points and authorities attached hereto, and the affidavit and accompanying exhibits.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD,
Assistant U. S. Attorney

POINTS AND AUTHORITIES
IN SUPPORT OF
OPPOSITION TO PETITION
FOR CORRECTION OF RECORD

The question of correcting or modifying a record on appeal is controlled by the Federal Rules of Civil Procedure. The Federal Rules of Criminal Procedure, Rule 39(b)(1), provides:

"The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."

Referring to Rule 75(h) of the Federal Rules of Civil Procedure, the question raised by petitioner is specifically covered. Rule 75(h) states:

"Power of Court to Correct or Modify Record.

". . . if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

The specific situation raised by petitioner herein was confronted by the Court of Appeals in Cox v. United States, 284 F.2d 704 (8 Cir. 1960). In the Cox case, ibid., appellant attempted to supplement the record by showing that a request was made in

court to examine the grand jury transcript. In support of said motion counsel for appellant filed an affidavit setting forth the testimony that was omitted from the Reporter's Transcript. This affidavit was corroborated by a second affidavit from counsel for a codefendant specifically recalling the same colloquy. The trial judge in his memorandum and order on this motion stated:

" . . . while he recalled an occasion when appellant's counsel approached the bench and made some request, . . . that he had no recollection of making or indicating any ruling in respect of the alleged request made by appellant's counsel, as set forth in his affidavit in support of motion. "

Utilizing this finding of fact the trial judge then refused to correct the record as requested by movant's counsel. The court held id. , at 711:

"The trial court's ruling on appellant's motion to correct the record is final and conclusive upon appeal. *Camps v. New York City Transit Authority*, *supra*, and *Century Indemnity Co. v. Arnold et al.* , 2 Cir. , 163 F.2d 531, certiorari denied 328 U.S. 854. . . . The trial court having stated that he has no recollection of appellant's alleged request, and under the applicable rule he being required to settle the record in case

of dispute as to what occurred, the attorney's affidavits as to what was said cannot now be considered on appeal. "

It is respectfully submitted that the affidavits and argument of petitioner be denied for the identical reasons given in the Cox case, supra. A review of the order of the Honorable Irving Hill will show, page 1, line 29:

" . . . the Court has no memory of the particular colloquy involved. The Court believes, however, from the context of the questioned colloquy that the reporter's transcript as written and submitted is correct. "

Furthermore, on page 2, the court specifically stated at line 5:

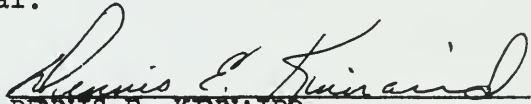
" . . . The court is further convinced and recalls that none of the colloquy which Defendant seeks to have inserted in the record, differing from the colloquy as shown in the reporter's transcript, occurred as alleged by Defendant and the other witnesses filing supporting affidavits. "

AFFIDAVIT OF DENNIS E. KINNAIRD

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.


DENNIS E. KINNAIRD, being first duly sworn,
deposes and says:

That I am the Assistant United States Attorney
assigned the responsibility of representing the appellee
in the instant appeal. That attached hereto is Exhibit
A, and incorporated herein by this reference into this
affidavit is a true and correct copy of the Order of
the Honorable Irving Hill, denying petitioner's said
motion for a correction of the record of the trial in
the above entitled appeal.

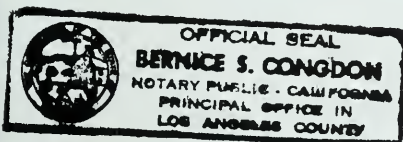

DENNIS E. KINNAIRD
Assistant U. S. Attorney

Affiant.

SUBSCRIBED AND SWORN TO BEFORE
ME this 30th day of April, 1968.


BERNICE S. CONGDON
Notary Public in and for said
County and State.

(SEAL) My commission expires: Jan. 25, 1969.



FILED

MAR 8 1968

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BY
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, }
Plaintiff, }
v. }
ROBERT CLAYTON BUICK, }
Defendant. }

No. 36082-III-CD

ORDER DENYING DEFENDANT'S
PETITION FOR CORRECTION
OF RECORD

Defendant filed under date of February 28, 1968, a document entitled "Petition for Correction of Record Hearing". Under date of February 29, 1968, the Court issued its Order to Defendant to furnish the detailed information concerning the particular corrections requested. Such information was furnished in a document entitled "Response to Order re Defendant's 'Petition For Correction of Record Hearing'" filed March 7, 1968. The Court has considered Defendant's said Petition, the said response, the affidavits filed in support of the Petition and the other documents and records of the within case.

IT IS ORDERED AS FOLLOWS:

1. As to the requested correction of the reporter's transcript, page 807, lines 19-20, the Court has no memory of the particular colloquy involved. The Court believes, however, from the content of the questioned colloquy that the reporter's transcript as written and submitted is correct.

1 2. As to the requested corrections in the reporter's
2 transcript page 245, lines 2-9, the Court recalls the colloquy
3 in question and is convinced that the reporter's transcript as
4 prepared and submitted contains a completely accurate report
5 of the colloquy in question. The court is further convinced
6 and recalls that none of the colloquy which Defendant seeks to
7 have inserted in the record, differing from the colloquy as
8 shown in the reporter's transcript, occurred as alleged by
9 Defendant and the other witnesses filing supporting affidavits.

10 IT IS ORDERED that each request for correction of the
11 reporter's transcript is denied.

12 IT IS FURTHER ORDERED that the Clerk serve copies of this
13 Order, by United States mail, on all parties to this action
14 this date.

15 DATED: March 8, 1968.
16

17 /s/ IRVING HILL
18 Irving Hill, Judge
19 United States District Court
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EXHIBIT A

